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No. 82-6080

In the Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, PETITIONER

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 24, 1983
CERTIORARI GRANTED JANUARY 24, 1983

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RELEVANT DOCKET ENTRIES

June 2, 1980: affirmance of conviction and death penalty by Texas Court of Criminal Appeals.

July 29, 1980: execution date set for October 13, 1981.

October 6, 1981: application for writ of habeas corpus denied by trial court.

October 9, 1981: Stay of execution granted by U.S. District Court pending consideration of writ of habeas corpus.

July 28, 1982: Evidentiary hearing federal district court.

September 28, 1982: Respondent's proposed findings of facts and conclusions of law filed.

November 5, 1982: Petitioner's proposed findings of facts and conclusions of law filed.

November 9, 1982: Court's findings of facts and conclusions of law filed denying habeas relief, dissolving stay of execution, and granting Petitioner's Motion for issuance of Certificate of Probable Cause and Motion to proceed in Forma Pauperis.

November 24, 1982: Notice of Appeal filed.

December 13, 1982: Certificate of Probable Cause filed.

December 20, 1982: Trial court set new execution date for January 25, 1983: Petitioner's plea to the jurisdiction denied.

December 20, 1982: Application for writ of habeas corpus and Motion for Stay of Execution filed in Texas Court of Criminal Appeals.

January 7, 1983: Notice from Texas Court of criminal appeals that application for writ of habeas corpus denied.

January 10, 1983: Motion for Stay of Execution filed with Texas Court of Criminal Appeals, denied January 11, 1983.

January 14, 1983: Motion for Stay of Execution filed in Court of Appeals for the Fifth Circuit.

January 17, 1983: Parties Notified to present briefs and arguments before Court of Appeals for the Fifth Circuit.

January 19, 1983: Briefs and oral arguments before Fifth Circuit.

January 20, 1983: Judgment of Fifth Circuit denying Stay of Execution.

January 21, 1983: Motion for Stay of Execution filed in United States Supreme Court.

January 24, 1983: Petition for certiorari filed and certiorari granted.

IN DISTRICT COURT
BELL COUNTY, TEXAS
27TH JUDICIAL DISTRICT

No. 26,812

THE STATE OF TEXAS

v.

THOMAS A. BAREFOOT AKA DARREN CALLIER

THE COURT'S CHARGE

MEMBERS OF THE JURY:

Having found the defendant, Thomas A. Barefoot AKA Darren Callier, guilty of the offense of capital murder, it now becomes your duty in reaching special verdicts to answer issues one and two hereinafter submitted to you.

The state must prove each issue submitted beyond a reasonable doubt.

You are instructed that you may not answer either issue "yes" unless the jury unanimously concurs, and, in such event, the special verdict is signed by your foreman. You may not answer either issue "No" unless ten or more of the jurors concur, and, in such event, the ten or more jurors concurring shall individually sign the special verdict. However, if the jury unanamously concurs in answering "No" on either issue, the special verdict shall be signed only by the foreman.

The punishment for the offense of capital murder in this state is death or confinement in the Texas Department of Corrections for life.

You are further instructed that if the jury returns an affirmative finding on each of the two issues submitted, this court shall sentence the defendant to death. If the jury returns a negative finding on either issue submitted, the

court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

The burden of proof is on the State. You are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and be governed thereby.

During your deliberations you are not to consider or discuss any possible actions of the Board of Pardons and Paroles or the Governor nor how long this defendant will be required to serve on a sentence of life imprisonment.

You are further instructed that in determining each of these special issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you.

There has been introduced the testimony of certain witnesses who purport to be skilled in their line of endeavor. Such witnesses are known in law as expert witnesses. An expert witness is one who is skilled in any certain science, art, business, or profession and possessed a peculiar knowledge acquired by study, observation and practice. You, the jury, are instructed that you may consider the testimony of these witnesses and give it such weight and value as you think it should have, but the weight and value to be given their testimony is for you to determine.

The testimony of any expert, like that of any other witness, is to be received by you and given such weight and value as you deem it is entitled to receive.

/s/ _____

Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

No. W-81-CA-191

THOMAS BAREFOOT

v.

W. J. ESTELLE, JR.

FINDINGS OF FACT AND CONCLUSION OF LAW—NOVEMBER 9, 1982

This case was tried on July 28, 1982, before the Court. After hearing the testimony, exhibits and pleadings, and the arguments of counsel, the Court enters the following Findings of Fact and Conclusions of law:

FINDINGS OF FACT

1. This is a habeas corpus case brought by a state prisoner on death row under 28 U.S.C. 2254. Respondent has custody of Petitioner pursuant to a judgment and sentence of the 27th District Court of Bell County, Texas. Petitioner was indicted for the offense of capital murder. On November 14, 1978, Petitioner was tried before a jury which found him guilty of capital murder. The same jury answered two special issue questions on punishment in the affirmative, thus resulting in a sentence of death. Upon automatic appeal to the Texas Court of Criminal Appeals, the conviction was affirmed on June 2, 1980. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). Thereafter, Petitioner was sentenced to die by injection before sunrise on September 17, 1980.

2. On July 29, 1980, a stay of execution was granted by the Supreme Court of the United States pending the filing of a petition for writ of certiorari. The petition was filed in Cause No. 80-5320 on August 27, 1980, and on June 29, 1981, the petition was denied and the stay of execution was

dissolved. On August 14, 1981, Petitioner was again sentenced to death by the trial court which set his execution sometime before sunrise on October 13, 1981.

3. Petitioner then filed an application for writ of habeas corpus in state court on September 29, 1981. This application was denied by the Texas Court of Criminal Appeals on October 7, 1981. On October 9, 1981, in this cause under No. A-81-CA-422, Petitioner's execution was stayed pending consideration of his application for writ of habeas corpus. This Court conducted an evidentiary hearing in this cause on July 28, 1982.

4. At the evidentiary hearing, Respondent was represented by Assistant Attorney General Douglas M. Becker. Petitioner was represented by his appointed counsel, Will Gray.

5. There are virtually no disputed facts relating to the issues raised by the parties in this case. The Pre-Trial Order signed by the parties lists but one contested material issue of fact: whether Petitioner's counsel at the time of trial understood *Witherspoon* v. *Illinois*, 391 U.S. 510, 88 S.Ct. 1770 (1968).

6. Essentially, Petitioner claims that one prospective juror, Ruby Sanders, was excluded in violation of *Witherspoon* and that his attorneys were ineffective for failing to object upon that basis. He contends that his attorneys were further ineffective because of their lack of understanding of *Witherspoon* generally and because they allowed the voir dire to be conducted in such a manner as to deprive Petitioner of due process of law. He contends that the entirety of the voir dire examination produced a jury organized to return a death penalty in violation of *Witherspoon* v. *Illinois*, supra. Petitioner also complains of the use of hypothetical questions at the punishment phase of his trial. Two psychiatrists, neither of whom had examined Petitioner, testified on the basis of a lengthy hypothetical question that, in their opinion, if Petitioner were not given the death penalty, he would continue to commit future acts of violence that would pose a danger to society. Finally, Petitioner complains that Tex. Code Crim. Proc. Ann. Art. 37.071, is unconstitutional because it contains no provisions for

directing the jury's consideration of mitigating circumstances.

7. Respondent denies each of these contentions. In addition, he asserts that Petitioner's complaints about the trial court's treatment of particular venirepersons was waived for Petitioner's failure to object at trial. Respondent further relies upon the presumption of correctness of state court findings of fact regarding this issue under *Sumner* v. *Mata*, 449 U.S. 559, 101 S.Ct. 764 (1981). Respondent also relies upon the state court findings of fact with respect to the quality of representation Petitioner received from his two appointed counsel. With respect to the use of psychiatric testimony, Respondent denies that such testimony is inherently unreliable and argues that *Jurek* v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and *Estelle* v. *Smith*, 451 U.S. ____, 101 S.Ct. 1866 (1981), specifically endorse such testimony. Respondent also alleges that for his failure to make proper objection at trial, Petitioner has procedurally defaulted this ground under *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977). Finally, Respondent relies upon *Jurek* v. *Texas*, supra, for the proposition that the Texas death penalty statute is constitutional.

8. The easiest issue will be dealt with first. The Texas capital sentencing procedure guides and focuses the jury's consideration of mitigating circumstances. In *Jurek* v. *Texas*, 478 U.S. 262, 272-73, 96 S.Ct. 2950, 2956-57 (1976), the United States Supreme Court held that "... the Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." Thus, even though the Texas capital sentencing procedure does not explicitly mention mitigating circumstances, the procedure in itself directs the jury's consideration to mitigating circumstances.

The record reflects that the trial court instructed the jury on punishment as follows:

> You are further instructed that in determining each of these special issues you may take into consideration *all of the evidence submitted to you* in the full trial of the case, that is, all of the evidence submitted to you

> in the trial of the first phase of this case, wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second phase of the trial, wherein you are called upon to determine the special issues hereby submitted to you (emphasis added).

This instruction provided for the jury's consideration of both mitigating and aggravating circumstances. The Texas Court of Criminal Appeals has often held that defendants in death penalty cases are entitled to extremely wide latitude in submitting mitigating evidence to the jury. The Texas procedures have been upheld many times, both in the state and federal courts. Petitioner points to no evidence whatsoever that he was prevented from producing at the punishment phase of trial. He makes no complaint that he was precluded from arguing that the import of certain evidence was mitigating. In the absence of any such allegations, his claim is without merit, and must be denied. He makes a general complaint that the trial court's charge ought to have directed greater attention toward mitigating circumstances, but the jury was instructed to take into consideration *all* of the evidence in the trial. Moreover, Petitioner made no objection to the trial court's charge upon this basis at trial. Accordingly, any error was waived. *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977).

9. Petitioner also raises claims relating to the treatment of 44 venirepersons by the trial court and the conduct of his trial counsel in that regard. The complaint that Petitioner's appointed counsel, Gerald Brown and Stephen Blythe, were incompetent and did not understand *Witherspoon* is frivolous. Both attorneys testified before this Court at the evidentiary hearing in this cause. Each attorney is highly knowledgeable in criminal law. Mr. Brown is a Board Certified Specialist in the State of Texas in Criminal Law. Each attorney testified in depth that before voir dire examination began, and after consultation with a psychologist, a profile was constructed of the ideal juror from Petitioner BAREFOOT's point of view, relying particularly upon Brown's and Blythe's knowledge of local circumstances and conditions. A coherent plan for the use of peremptory chal-

lenges was devised. The plan was modified in accordance with Petitioner BAREFOOT's animosity towards black and brown persons. There was a feeling that possibly Petitioner's animosity toward these persons might be communicated to them if they were selected for the jury. No person was rejected for services of juror by Petitioner's attorneys solely because he was black or brown, as they testified, but it was one additional factor in the equation. It was the Petitioner's request his attorneys consider this factor in that equation.

10. During voir dire examination, the attorneys consulted frequently and at length with their client. Decisions as to each prospective juror were reached mutually and after much discussion. Petitioner has complained that his attorneys failed to object to the exclusion of a great number of jurors who were not necessarily disqualified under *Witherspoon*. Since Brown and Blythe had retained their jury notes from trial, they refreshed their memory to some extent and were able to testify at the evidentiary hearing in detail as to the specific reasons, based upon trial strategy, as to why no objections were made to the exclusion of every single prospective juror about whom Petitioner had complained. Because a decision not to object to the exclusion of a juror was in every instance based upon reasonable strategy, Petitioner's asserted ground for relief must be rejected for that reason alone. The attorneys' strategy in every instance appears to this Court to have been a tactical decision based upon the attorneys' individualized knowledge of local conditions and circumstances and in conformance with the previously constructed juror profile.

11. Petitioner complains that venireperson Ruby Sanders was qualified for jury service under *Witherspoon* and should not have been excluded. The following question and answer during voir dire examination indicate that Petitioner's allegation is without merit.

> "Q. And that's why we're asking you all these questions, Mrs. Sanders. Do you feel then that no matter what facts in any case might show that you, if you are on the jury, if someone forced you to be on

a jury, that you could never vote in a case that would assess the death penalty on somebody because of what you believe and what you have already told me?

"A. *Yes, sir, that's right.* I don't think that I can feel right even if I was on the jury and convicted an individual, I don't think that my conscience would allow me to continue to live on knowing that I am sentimental and believe in capital punishment or death or into this world." (emphasis added)

Since Mrs. Sanders testified she could never vote to assess a death penalty in any case, she was disqualified for jury service under *Witherspoon*. Moreover, the failure of Petitioner's counsel to object waived any error. *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S.Ct. 2497 (1977); *Spinkellink* v. *Wainwright*, 578 F.2d 582 (5th Cir. 1978). The state court's finding on this matter is presumptively correct. *Sumner* v. *Mata*, 449 U.S. 559, 101 S.Ct. 764 (1981). At the evidentiary hearing in this cause, Petitioner's attorneys explained that even though they did not believe that Sanders was qualified for jury service under *Witherspoon*, there were additional, independent tactical reasons why they did *not* wish her to be on Petitioner's jury, even if she might have been rehabilitated. For these reasons, Petitioner does not satisfy the good cause exception of *Wainwright* v. *Sykes*. *See also: Engle* v. *Isaac*, Slip Op. No. 80-1430 (U.S., April 5, 1982).

12. Petitioner's allegation that the entire jury voir dire was fundamentally unfair and was organized to select a jury that would return the death verdict in violation of *Witherspoon* is without merit. Respondent's Answer catalogs the venirepersons of whom Petitioner has complained. Of the 44 venirepersons of whom Petitioner complains, 28 were dismissed without objection. In five cases, Petitioner's motion to disqualify a juror was overruled. In eleven other cases, Petitioner does not object to the exclusion of a juror or the trial court's overruling his motion to exclude a juror, but objects instead to statements the prosecutor made without objection to such prospective jurors.

13. Regarding the first group of 28 jurors, many were excused for entirely innocuous reasons, such as an ill spouse or a job important to the welfare of the community, such as teaching public school, and often before any opinion as to the death penalty had been expressed. In most of these cases, defense counsel affirmatively agreed to the exclusion of such jurors and no objection was made to the exclusion of any of them. At the evidentiary hearing in this Court, Petitioner's trial attorneys were able to explain why they and Petitioner mutually agreed that they did not desire each of these jurors to be selected. Nor error is shown.

14. Next, Petitioner's motions to exclude five jurors, Korpiva, Baker, Walker, Latsha, and Smith, were rejected by the trial court. The Texas Court of Criminal Appeals dealt at length with Petitioner's motions to exclude Korpiva, Latsha, and Smith. *Barefoot* v. *Smith*, 596 S.W.2d 875, 881-86 (Tex. Crim. App. 1980) (en banc). None was subject to dismissal for reasons set forth therein. Moreover, this finding by the highest Texas appellate court of criminal jurisdiction is presumptively correct. *Sumner* v. *Mata*, *supra*.

15. Petitioner's objection to venireperson Baker was that he could not be fair because of overexposure to publicity concerning the case. In light of his unequivocal statement that he could be fair and impartial, Petitioner's motion to exclude him was meritless. Petitioner's objection to venireperson Walker was similarly without merit. Petitioner's complaint that Walker showed himself to be "patently committed to the death penalty" must be rejected in view of the lengthy rehabilitation by the prosecutor. Moreover, it does not appear that Petitioner ever renewed his objection following that rehabilitation; accordingly, it was procedurally defaulted. *Wainwright* v. *Sykes*, supra.

16. Additionally, Petitioner complains that the prosecutor misinformed 11 jurors as to the law. He has been unable, however, to specify any misstatements of law in the record. It appears that the prosecutor merely discussed the applicable law generally to such venirepersons. In the event any incidental misstatement of law was made, it does not approach the level of denial of due process of law.

Moreover, Petitioner's attorneys did not object to any of such statements. Accordingly, Petitioner is procedurally defaulted under *Wainwright* v. *Sykes*, supra, from complaining about them now. Petitioner's attorneys also explained at the evidentiary hearing that, regarding an incidental misstatement, it is possible they might not have objected for one of several reasons. First, as a matter of strategy, they might have been interested in the juror's response to a particular question and felt that the question was not unduly prejudicial. Second, the prosecutor might have misstated the law in a matter not prejudicial to Petitioner or, at most, neutral as to him. Attorneys are expected to exercise their professional judgment in choosing the proper time and subject to raise their objections.

17. Petitioner also complains about hypothetical questions posed to psychiatrists at the punishment phase of his trial. Upon careful reflection, this ground is without merit. In *Jurek* v. *Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), and *Estelle* v. *Smith*, 451 U.S.____, 101 S.Ct. 1866 (1981), the Supreme Court of the United States specifically upheld the predictive nature of the Texas capital punishment sentencing process, and further, specifically upheld the use of psychiatric testimony on the issue of future dangerousness as a matter that may be considered by the jury. The holding of those cases is that, although psychiatric testimony is valuable in assisting the jury in its consideration of future dangerousness, the Texas procedures quite properly are not *limited* to expert psychiatric testimony, but are also amenable to testimony by laypersons. In *Jurek*, supra, at 275-76, the Court stated:

> "[P]rediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, those same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the

statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice." (footnotes omitted)

Additionally, in *Smith* v. *Estelle*, supra, at 1878, the Supreme Court stated, "While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts."

18. The majority of psychiatric experts agree that where there is a pattern of repetitive assaultive and violent conduct, the accuracy of psychiatric predictions of future dangerousness dramatically rises.[1] The accuracy of this conclusion is reaffirmed by the expert medical testimony in this case at the evidentiary hearing. Dr. George Parker, a psychologist, testified for Respondent that professional literature indicates that predicting future dangerousness among random mental patients or even felons generally is not terribly accurate. The prediction of future dangerousness, however, becomes easier as the pattern and history of violence becomes more repetitively persuasive. Petitioner was diagnosed at trial as a sociopath, anti-social type, severe. Indeed, based upon the facts stated in the hypothetical question posed by the prosecutor at trial, all medical experts at the evidentiary hearing agreed with this diagnosis. Dr. Fred Fason, a psychiatrist who testified on behalf of Petitioner, testified that he was 90% sure that Petitioner was a severe anti-social sociopath who would commit future acts of violence dangerous to society. Dr. Wendell Dickerson, a psychologist, testified that he was almost 90% sure of the same decision. Dr. Richard Koons and Dr. Parker testified that they were extremely sure of the same conclusion.

19. It would appear that Petitioner's complaint is not the diagnosis and prediction made by Drs. Holbrook and Grigson at the punishment phase of his trial, but that Dr. Grigson expressed extreme certainty in his diagnosis and pre-

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[1] *See: Amicus curiae* brief of American Psychiatric Association in *Estelle* v. *Smith*, supra.

diction. Petitioner's experts have testified that such certainty is unsupportable in the medical profession. Moreover, Respondent's experts testified that they themselves could not be 100% sure in their diagnosis and prediction regarding Petitioner, but that they would be very close to completely certain.

20. In any event, the differences among the experts were quantitative, not qualitative. The differences in opinion go to the weight and not the admissibility of such testimony. The Court is unaware of any theory upon which the writ of habeas corpus may be granted or Petitioner's death penalty invalidated simply because an expert testified that he was competely certain rather than almost completely certain of a particular conclusion. Petitioner was not hampered in his cross-examination of the psychiatrists at trial. He was not precluded from presenting before the jury the identical testimony that he presented in the evidentiary hearing in this cause. Such disputes are within the province of the jury to resolve. Indeed, it is a fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters, and, when called upon to do so, to give greater credence to one party's expert witnesses than another's. Such matters occur routinely in the American judicial system, both civil and criminal. If the state psychiatrists at trial erred in being overconfident as to their diagnosis of Petitioner, then Petitioner should have presented impeaching evidence or rebuttal testimony. Petitioner is not entitled to relief on this ground of asserted error.

CONCLUSION OF LAW

1. The Petitioner is not in custody, or sentenced, in violation of the Constitution or laws or treaties of the United States.

The Court will enter judgment in accordance with these findings.

SIGNED and ENTERED this 9th day of November, 1982.

/s/_____

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

No. W-81-CA-191

THOMAS BAREFOOT

v.

W. J. ESTELLE, JR.

JUDGMENT

In accordance with this Court's Findings of Fact and Conclusions of Law heretofore entered,

IT IS ORDERED, ADJUDGED and DECREED that Petitioner take nothing in this action and that Judgment be entered for Respondent herein.

SIGNED and ENTERED this 9th day of November, 1982.

/S/ LUCIUS D. BUNTON

LUCIUS D. BUNTON
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1680

THOMAS A. BAREFOOT, PETITIONER-APPELLANT,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
RESPONDENT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(January 20, 1983)

Before REAVLEY, RANDALL and JOLLY, *Circuit Judges*

PER CURIAM:

Thomas A. Barefoot was convicted in November, 1978 of murdering a Harker Heights police officer in Bell County, Texas on August 7, 1978.[1] The Court of Criminal Appeals of Texas affirmed the conviction on March 12, 1980 and denied rehearing on April 30, 1980. *Barefoot* v. *State*, 596 S.W.2d 875 (Tex. Crim. App. 1980). Barefoot was sentenced to die on September 17, 1980. The United States Supreme Court stayed execution and then dissolved the stay when certiorari was denied on June 29, 1981, 453 U.S. 913. Barefoot was again sentenced to die on October 13, 1981.

[1] The jury answered affirmatively to these questions of the Tex. Code of Crim. Ann. art. 37.071:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.

The state district court denied habeas, as did the Court of Criminal Appeals. The federal district court then stayed the execution on October 9, 1981. After an evidentiary hearing, that federal court denied habeas corpus on November 11, 1982. The State of Texas moved to vacate the stay of execution and the court did vacate it on December 8, 1982. Because the district court granted certificate of probable cause, the denial of habeas is now on appeal in this court. Barefoot has now been resentenced and is to die before sunrise on January 25, 1983. Barefoot moves to stay execution of the sentence pending appeal.

Following the 1978 trial and conviction in Bell County, the Bell County District Court has reviewed the conviction on collateral attack, the Texas Court of Criminal Appeals has reviewed the conviction four times (once on direct appeal and three times on collateral attack), the Supreme Court of the United States has reviewed it on application for certiorari, and the federal district court has held an evidentiary hearing and—after 14 months—upheld the conviction.

1. THE NATURE OF OUR DECISION

This panel has studied the briefs and record filed with us and has conducted a hearing on January 19, 1983, at which the petitioner's attorney was allowed unlimited time to discuss any matter germane to the decision before us.

That decision is a limited one. This court may interfere with the action of the State of Texas only upon a showing that the Constitution of the United States has been violated. Upon the question of whether to stay execution until the appeal has been processed, we consider the likelihood of success of that appeal. *Ruiz* v. *Estelle*, 650 F.2d 555 (5th Cir. 1981). There should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below. *Ruiz* v. *Estelle*, 666 F.2d 854, 857 (5th Cir. 1982). If after all these years of study, no constitutional imperfections of substance can be found, it becomes the duty of this court to deny the stay and refuse to interfere with the authorities of the State of Texas as they follow the laws of that state.

2. THE TRIAL COURT'S CERTIFICATE OF PROBABLE CAUSE

We note that the district court's issuance of a certificate of probable cause bears upon our consideration here. In this circuit, "We have equated probable cause ... to a 'substantial showing of the denial of [a] federal right.'" *Stewart* v. *Beto*, 454 F.2d 268, 270 n.2 (5th Cir. 1971), *quoting Harris* v. *Ellis*, 204 F.2d 685, 686 (5th Cir. 1953). And if the denial of a certificate by a district judge should be given "weighty consideration" by a circuit judge, *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967), then the granting of a certificate should be entitled to similar treatment. However, this does not relieve us of our duty under Fed. R. App. P. 8 to decide the issue for ourselves. To give too much weight to the district court's issuance of the certificate would be to give it preclusive effect on our determination of the stay issue. Rule 8 clearly contemplates that it is the appellate court's responsibility to decide the merits of the stay.[2]

This court had the same question before it last month in *Brooks* v. *Estelle*, ____ F.2d ____. The stay was denied by this court and also by the Supreme Court. 51 U.S.L.W. 3469 (U.S. Dec. 6, 1982). Justices Brennan, Marshall and Stevens dissented from the denial of the stay. They argued that once a certificate of probable cause has been issued, the appellant "must then be afforded an opportunity to address the merits." *Garrison* v. *Patterson*, 391 U.S. 464, 466 (1968). *See also Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967). ("When a district court grants a certificate of probable cause the court of appeals must ... proceed to a disposition of the appeal in accord with its ordinary procedure.")

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[2] This preclusive effect is also inconsistent with the district court's denial of the stay in the first instance. The district court must have thought that appellant did not meet the requirements of a stay. Yet, if we gave the C.P.C. preclusive effect, then we would in effect be saying that its issuance means that the district court thought petitioner is entitled to a stay.

The simple response to this argument is that since six members of the Court denied the petition for stay, this argument must have been rejected. We respectfully suggest, however, that *Nowakowski* and *Garrison* are inapposite here. In *Garrison*, the court of appeals upon motion for a certificate of probable cause, simultaneously granted the certificate and, without argument on the merits or explanation of its reasons, affirmed the district court. *Nowakowski* dealt with a denial of leave to proceed *in forma pauperis* once the district court had granted a certificate of probable cause. The Court's concern was the attempt by the appellate court to circumvent the district court's power to grant a habeas petitioner an appeal.

Neither of these cases addressed a situation in which the party had an opportunity to brief and argue the merits of the underlying issues, nor do they suggest that the stay procedure of Rule 8 is somehow abrogated by the granting of a certificate of probable cause. We think that this case is controlled by *Carafas* v. *LaVallee*, 29 U.S. 234 (1968), more than *Garrison* and *Nowakowski*. In *Carafas*, the Court, as in *Nowakowski*, reversed the second circuit's denial of leave to proceed *in forma pauperis*. The Court discussed *Nowakowski* and its implications. The Court stated:

> Nothing in the order entered by the Court of Appeals, however, indicates that the appeal was duly considered on its merits as *Nowakowski* requires in cases where a certificate of probable cause has been granted. Although *Nowakowski* does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is frivolous, enough must appear to demonstrate the basis for the court's summary action.

Id. at 242. Our actions here fall under this language. Petitioner's motion is directed solely to the merits. The parties have been also afforded an unlimited opportunity to make their contentions upon the underlying merits by briefs and oral argument. This opinion demonstrates the reasons for our decision. We think, therefore, that the arguments put forth by the dissenters in *Brooks* should not prevent us

from denying this stay if there is an indisputable absence of merit to the petitioner's complaint.

3. MERITS OF APPEAL: PSYCHIATRIC TESTIMONY ON DANGEROUSNESS

The sole issue that petitioner raises on appeal concerns testimony at the sentencing stage by two psychiatric experts regarding appellant's future dangerousness. Neither of these witnesses had interviewed petitioner, but testified on the basis of hypothetical questions. Petitioner argues that the admission of this testimony amounts to constitutional error.

The evidence before the federal district court supported its conclusion that the accuracy of psychiatric predictions of future dangerousness dramatically rises where there has been a pattern of repetitive assaultive and violent conduct. The majority of psychiatric experts accept that view. All of the experts have testified that the conduct of the petitioner, to which the assumed facts adhered in the hypothetical question put to the psychiatrists at the original trial, was the conduct of a severe sociopath. They disagreed over the degree of certainty with which future conduct could be predicted, but this only shows a difference of opinion among professionals—no rarity to the courts or to citizens who serve as jurors. We find no error of law or violation of the constitution in the admission into evidence of those opinions, the proper predicate having been laid.

Petitioner relies on *Green* v. *Georgia*, 442 U.S. 95 (1979), and *Gardner* v. *Florida*, 430 U.S. 349 (1977), for the proposition that the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment set limits upon the types of evidence that may be presented at a sentencing hearing. He then argues that the doctor's testimony is inherently unreliable. He asserts that the inaccuracy in predicting future dangerousness, particularly when no inerview has been conducted, requires that the testimony be excluded. He also argues that since the hypotheticals did not include the mitigating evidence, this increases the inaccuracy of the testimony and permits the jury to avoid consideration of the mitigating evidence by simply relying on the doctor's

testimony that the accused was a sociopath who would commit future acts of violence.

In *Gardner*, the Court dealt with a death sentence in which the trial judge rejected the jury's recommendation of a life sentence on the basis of a confidential pre-sentence investigation report which was not disclosed to the accused. The opinions of the Court reflect a concern not for a specific evidentiary rule, but for the nature of the adversary system and the need for the accused and his counsel to be able to respond to this evidence.

In *Green*, the state court excluded evidence that the accused's codefendant had actually killed the victim. This evidence consisted of a hearsay statement by the codefendant to a friend. The Court reversed, stating:

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, *under the facts of this case* its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue, in the punishment phase of the trial ... (emphasis added)

442 U.S. at 97. We think that *Green* is limited to its facts, and certainly did not federalize the law of evidence. It does, however, indicate that certain egregious evidentiary errors may be redressed by the due process clause.

We think, however, that the Supreme Court has, by implication at least, approved of psychiatric testimony in cases such as these. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), the Supreme Court rejected the argument that requiring the jury to predict future behavior is so vague and uncertain as to be meaningless. While the Court did not deal specifically with what types of evidence the jury may hear, the Court stated that a jury is equipped to make such a determination. The Court stated: "What is important is that the jury have *all possible relevant information* about the individual defendant...". Psychiatric testimony would clearly appear to be relevant to the jury's determination. The fact that such testimony may not always be totally accurate does not affect its relevance to the issue.

Further indication of the approval of psychiatric testimony is contained in *Estelle* v. *Smith*, ___ U.S. ___, 101 S.Ct. 1866 (1981). The Court dealt with whether the state could use psychiatric testimony at the sentencing stage when the testimony was based on an interview with the defendant and when (1) defendant's counsel was not notified and (2) the defendant was not warned of his right to remain silent. The Court held that this did violate the defendant's rights. The Court, however, went on to discuss the effect of its holding on the state's ability to prove dangerousness. The Court states:

> [U]nder the Texas capital sentencing procedure, the inquiry necessary for the jury's resolution of the future dangerousness issue is in no sense confined to the province of psychiatric experts....

___ U.S. at ___, 101 S.Ct. at 1878. The Court went on, saying

> While in no sense disapproving the use of psychiatric testimony bearing on the issue of future dangerousness, the holding in *Jurek* was guided by recognition that the inquiry mandated by Texas law does not require resort to medical experts.

Id. These statements indicate that expert testimony meets constitutional requirements for admissibility.

Petitioner argues that the Court was addressing the facts of *Smith*, where the psychiatrist had interviewed the defendant. But there is no indication in *Smith* that the discussion regarding psychiatric testimony was limited to testimony based on personal interviews. More importantly, we think to reject such testimony would be inconsistent with *Smith* and *Jurek*. In *Smith* the Court held that the state could not compel the defendant to submit to a psychiatric interview. Thus, were we to hold that a psychiatrist (or other mental health professional) could not testify on the basis of hypotheticals or an examination of the defendant's record, we would be giving the defendant the right to prevent any and all psychiatric testimony on the issue of dangerousness except psychiatric testimony in his own favor. We think this is inconsistent with the aim approved in *Jurek* that "the jury have before it all relevant informa-

tion." In addition, we note that if testimony by a mental health professional, trained to detect mental illness and personality types, is inherently unreliable on the issue of future dangerousness, then would not testimony and a decision by untutored lay persons on this issue be even more unreliable? The Supreme Court thinks otherwise as was shown in *Jurek* and *Smith* in holding that the jury could decide the issue and the inquiry mandated by Texas law does not require resort to medical experts." 101 S.Ct. at 1878.

4. JURISDICTION OF STATE COURT TO RESENTENCE

While the present appeal to this court was pending, the state district court set petitioner's execution date. Petitioner argued to the state court, the Court of Criminal Appeals and now before this court, that while this appeal is pending, the state court has no jurisdiction to resentence. Alternatively, he argues that if the state courts do have jurisdiction, then he is being denied equal protection of the laws because the Texas courts are closed to him.

These arguments have no merit. The first argument is actually a state law issue which we do not have the power to address in a habeas proceeding. Petitioner's second argument is based on Ex Parte Powers, 487 S.W.2d 101 (Tex. Crim. App. 1972), Ex Parte Green, 548 S.W.2d 914 (Tex. Crim. App. 1977), and Ex Parte McNeil, 588 S.W.2d 592 (Tex. Crim. App. 1979) (en banc). These cases stand for the proposition that

> A petitioner must decide which forum he will proceed in, because this Court will not, and a trial court in this State should not, consider a petitioner's application so long as the federal courts retain jurisdiction of the same matter.

Green, 548 S.W.2d at 916. We recently discussed this rule in depth, descriping it as a rule of habeas abstention based on comity. *Carter* v. *Estelle*, 677 F.2d 427 (5th Cir. 1982). We do not see how these cases have any application to this case. This rule is one of judicial efficiency which merely prevents the petitioner from litigating the same habeas issues in two forums at the same time. Setting an execution

date is clearly not a habeas suit. It is a collateral matter that is not part of the habeas suit. Such a rule would allow petitioner to suspend his sentencing whatever the lack of merit and entitlement to stay. We therefore reject this argument.

5. NEWLY DISCOVERED EVIDENCE: MARY RICHARDS

Petitioner fortells grounds for another try at habeas relief because of "newly discovered evidence." Petitioner's attorney interrogated Mary Richards under oath a few weeks ago, without the presence of a representative of the state, and her answers are said to conflict with her testimony for the state at Barefoot's trial and to raise questions of prosecutorial misconduct. We have before us the recent statement of Richards as well as her trial testimony.

Richards lived in the area where the killing occurred. She testified at the trial that she heard two shots that night and, when she looked out her window, she saw a man run by who resembled Barefoot. She now says that it could not have been Barefoot, because the hair and height and build of the two men differed. She says that she has always told everyone who interrogated her, including the investigator who worked for the attorneys defending Barefoot, and everybody she knows, about the true appearance of the man she saw. She explains her testimony at trial on the grounds that it was Barefoot's eye area that resembled the man she had seen and, further, that her testimony was false because an assistant district attorney and his investigator frightened her by telling her Barefoot intended to kill everyone in the office where she worked and that she should just answer the questions "yes" or "no."

It is difficult to accept this current statement of Richards. No rational prosecutor would have called her as a witness if she had told him what she now says she did. Her testimony was not important, to begin with. Her testimony of hearing two shots raised an inconsistency, because the other evidence, including that of an eye witness to the shooting, was that only one shot was fired. With the strong identification of Barefoot by the other witnesses, to place Mary Richards on the stand if she thought she had seen a

different man, would have only contributed another inconsistency. No attorney would have thought she could survive non-leading direct testimony and the cross-examination with only "yes" or "no." If she had told "everybody" and the investigator for the defense of her description of the man she saw, as she now says she did, that would have been played to the hilt by the defense.

Nevertheless, the testimony of Mary Richards, one way or the other, cannot and could not affect the determination of Barefoot's guilt. His presence on the scene was clearly established as was his guilt. He admitted (actually, boasted of) his guilt to his friends. The gun which fired the fatal shot was in his pocket when he was arrested. He had told others in advance that he planned to kill the Harker Heights policeman and that he was to commit a robbery after creating a diversion by setting fire to a building. A roommate testified that he dropped Barefoot off near the Silver Spur, a nightclub, at 5:00 am. A Fort Hood soldier saw a man, whom he identified at trial as Barefoot, standing in the parking lot of the Silver Spur watching the building burn. After reporting the fire, the soldier saw Barefoot again near Amy Lane. He told the officer this, and the officer drove his patrol car toward Amy Lane. Another soldier saw that officer get out of his car at the intersection of Amy Lane and Valley Road. A man wearing a white T-shirt and blue jeans, as Barefoot was dressed, stepped out of the bushes, walked to the officer and shot him in the head at point-blank range, and fled down Valley Road. (Mary Richards lived on Valley Road.)

Even if we were to assume for present purposes (and we would do so for no other purpose), that the prosecutor deliberately frightened Mary Richards to obtain her testimony and then sat by without disclosing that her testimony conflicted with her prior description, a reversal of the conviction would not be justified for the reason that the omitted evidence could not create a reasonable doubt of Barefoot's guilt, and the alleged prosecutorial conduct could not have an effect on the trial. *See Smith* v. *Phillips*, ___ U.S. ___, 102 S.Ct. 940 (1982); *United States* v. *Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

This point has been raised and rejected by collateral attack in the Texas courts. There would be no justification for delay in order to have a further presentation in the federal courts.

6. CONCLUSION

This Court has had the benefit of the full trial court record except for a few exhibits unimportant to our consideration. We have read the arguments and materials filed by the parties. The petitioner is represented here, as he has been throughout the habeas corpus proceedings in state and federal courts, by a competent attorney experienced in this area of the law. We have heard full arguments in open court. Finding no patent substantial merit, or semblance thereof, to petitioner's constitutional objections, we must conclude and order that the motion for stay should be DENIED.

Supreme Court of the United States

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER,

v.

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS

ORDER ALLOWING CERTIORARI. Filed January 24, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit before judgment is granted.

Supreme Court of the United States

No. 82-6080

THOMAS A. BAREFOOT, PETITIONER,

v.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

ON CONSIDERATION of the motion of petitioner for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

FEBRUARY 28, 1983